



DEFENSE LOGISTICS AGENCY  
DEFENSE LOGISTICS SUPPORT COMMAND  
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FORT BELVOIR, VIRGINIA 22060-6221

JAN 20 1999

IN REPLY  
REFER TO

DLSC-P  
FARS DEV 99- 01

MEMORANDUM FOR PROCLTR DISTRIBUTION LIST

SUBJECT: Class Deviation - Equal Employment Opportunity

This memorandum forwards the subject class deviation issued by the Director, Defense Procurement, dated December 30, 1998. This deviation accelerates implementation of revisions to the FAR published in Federal Acquisition Circular (FAC), FAC 97-10, effective February 16, 1999, which have not changed since promulgation of FARS DEV 98-04. Contracting officers shall deviate from the requirements of FAR Subpart 22.8, Equal Employment Opportunity, in obtaining preaward compliance clearances, and shall use the attached clauses and provisions instead of the clauses and provisions at FAR 52.212-3, and 52.222-21 through 52.222-24 and 52.222-26 through 52.222-29.

This FARS DEV is effective immediately and expires February 15, 1999.

Attachment

*William J. Kenny*

WILLIAM J. KENNY  
Executive Director  
Procurement Management





ACQUISITION AND  
TECHNOLOGY  
DP (DAR)

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

JAN 5 1999

December 30, 1998

In reply refer to  
DAR Tracking Number: 98-00012

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES  
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,  
ASN (RD&A) /ABM  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING), SAF/AQC  
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)  
COMMANDER, DEFENSE CONTRACT MANAGEMENT COMMAND, DEFENSE  
LOGISTICS AGENCY

SUBJECT: Class Deviation-Equal Employment Opportunity

Effective immediately, all military departments and defense agencies shall deviate from the requirements of Federal Acquisition Regulation (FAR) Subpart 22.8, Equal Employment Opportunity, and the clauses and provisions prescribed therein. Specifically, contracting officers shall implement the attached FAR Subpart 22.8, and shall use the attached clauses and provisions instead of the clauses and provisions at FAR 52.212-3 and 52.222-21 through 52.222-24 and 52.222-26 through 52.222-29.

This deviation accelerates implementation of revisions to the FAR published in Item III of Federal Acquisition Circular 97-10, effective February 16, 1999. In part, Item III increases from \$1 million to \$10 million the threshold for obtaining from the Office of Federal Contract Compliance Programs (OFCCP) preaward compliance clearance of prospective contractors, and reduces OFCCP and contracting agency processing times.

This class deviation supersedes Class Deviation Number 98-00002 and is approved until February 16, 1999.

*Eleanor R. Spector* COL, USA  
Eleanor R. Spector  
Director, Defense Procurement

Attachment:  
As stated

cc: DSMC, Ft. Belvoir



**PART 22--APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

\* \* \* \* \*

**SUBPART 22.8--EQUAL EMPLOYMENT OPPORTUNITY**

**22.800 Scope of subpart.**

This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by ~~Government~~ contractors and subcontractors.

**22.801 Definitions.**

**[As used in this subpart--]**

"Affirmative action program," ~~as used in this subpart, as used in this subpart,~~ means a contractor's program that complies with Department of Labor regulations to ensure equal opportunity in employment to minorities and women.

**["Compliance evaluation" means any one or combination of actions that the Office of Federal Contract Compliance Programs (OFCCP) may take to examine a Federal contractor's compliance with one or more of the requirements of E.O. 11246.]**

~~"Construction work," as used in this subpart, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.~~

~~"Contracting agency," as used in this subpart, means any department, agency, establishment, or instrumentality in the Executive Branch of the Government, including any wholly owned Government corporation that enters into contracts.~~

~~"Contractor," as used in this subpart, includes the terms "prime contractor" and "subcontractor."~~

~~"Director [Deputy Assistant Secretary],"~~ as used in this subpart, means the ~~Director, Office of [Deputy Assistant Secretary for]~~ Federal Contract Compliance Programs (OFCCP), ~~U[.]nited S[.]tates~~ Department of Labor[, or a designee].

~~"Equal Opportunity clause,"~~ as used in this subpart, means the clause at 52.222-26, Equal Opportunity, prescribed in 22.810(e).

~~"E[.]O[.] 11246,"~~ as used in this subpart, means Parts II and IV of Executive Order 11246, September 24, 1965 (30 FR 12319), and any Executive order amending or superseding this Order (see 22.802). This term specifically includes the Equal Opportunity clause at 52.222-26, and the rules, regulations, and orders issued pursuant to E[.]O[.] 11246 by the Secretary of Labor or a designee.

~~"Government contract,"~~ as used in this subpart, means any agreement or modification thereof between a Government contracting agency and any person for the furnishing of supplies or services, or for the use of real or personal property including lease arrangements. The term does not include—

~~(a) Agreements in which the parties stand in the relationship of employer and employee; and~~

~~(b) Contracts for the sale of real and personal property by the Government.~~

~~"Prime contractor,"~~ as used in this subpart, means any person who holds, or has held, a Government contract subject to E[.]O[.] 11246.

~~"Recruiting and training agency,"~~ as used in this subpart, means any person who refers workers to any contractor ~~or subcontractor~~ or provides or supervises apprenticeship or training for employment by any contractor ~~or subcontractor~~.

~~"Site of construction,"~~ as used in this subpart, means the general physical location of any building, highway, or other change or improvement to real property that is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair; and any temporary location or facility at which a contractor, ~~subcontractor~~, or other participating party meets a demand or performs a function relating to a Government contract or subcontract.

"Subcontract," ~~as used in this subpart,~~ means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee)--

(a) For the **[purchase, sale,]** ~~furnishing of supplies or services or for use of real or personal property [or nonpersonal services that], including lease arrangements that,~~ in whole or in part, are necessary to the performance of any one or more ~~Government~~ contracts; or

(b) Under which any portion of the contractor's obligation under any one or more ~~Government~~ contracts is performed, undertaken, or assumed.

"Subcontractor," ~~as used in this subpart,~~ means any person who holds, or has held, a subcontract subject to E[.]O[.] 11246. The term "first-tier subcontractor" means a subcontractor holding a subcontract with a prime contractor.

"United States," ~~as used in this subpart,~~ means the **[several]** States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, **[Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.]** ~~and the possessions of the United States.~~

## 22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all ~~Government contracting~~ agencies--

(1) Include this clause in all nonexempt ~~Government prime~~ contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin.

(b) No contract or modification involving new acquisition shall be entered into, and no subcontract shall be approved by a contracting officer, with a person who has been found ineligible by the ~~Director~~ **[Deputy Assistant Secretary]** for reasons of noncompliance with the requirements of E[.]O[.]

11246.

(c) No contracting officer or contractor shall contract for supplies or services in a manner so as to avoid applicability of the requirements of E[.]O[.] 11246.

(d) Contractor disputes related to compliance with its obligation shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR 60-1.1).

#### **22.803 Responsibilities.**

(a) The Secretary of Labor is responsible for the--

(1) Administration and enforcement of prescribed parts of E[.]O[.] 11246; and

(2) Adoption of rules and regulations and the issuance of orders necessary to achieve the purposes of E[.]O[.] 11246.

(b) The Secretary of Labor has delegated authority and assigned responsibility to the ~~Director~~ **[Deputy Assistant Secretary]** for carrying out the responsibilities assigned to the Secretary by E[.]O[.] 11246, except for the issuance of rules and regulations of a general nature.

(c) The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

(d) In the event the applicability of E[.]O[.] 11246 and implementing regulations is questioned, the contracting officer shall forward the matter **[to the Deputy Assistant Secretary,]** through agency channels[, ] for resolution.

#### **22.804 Affirmative action programs.**

##### **22.804-1 Nonconstruction.**

Except as provided in 22.807, each nonconstruction prime contractor and each subcontractor with 50 or more employees and—**[either]**

~~(a)~~—A **[a]** contract or subcontract of \$50,000 or more+

or

~~(b)~~ Government bills of lading that in any 12-month period, total, or can reasonably be expected to total, \$50,000 or more, is required to develop a written affirmative action program for each of its establishments[. **Each contractor and subcontractor shall develop its written affirmative action programs**] within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

## **22.804-2 Construction.**

(a) Construction contractors that hold a nonexempt (see 22.807) Government construction contract are required to meet--

(1) The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and

(2) Applicable requirements of 41 CFR 60-1 and 60-4.

(b) Each ~~contracting~~ agency shall maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected contracting officers in accordance with agency procedures. Any contracting officer contemplating a construction project in excess of \$10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the solicitation.

(c) Contracting officers shall give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office, the contracting officer shall arrange a conference among contractor, contracting activity, and

compliance personnel to discuss the contractor's compliance responsibilities.

## **22.805 Procedures.**

(a) Preaward clearances for contracts and subcontracts of \$1[0] million or more (excluding construction). (1) Except as provided in 22.805 ~~[paragraphs (a) (4) and (a) (8)]~~ ~~(a) (7)~~ below **[of this section]**, if the estimated amount of the contract, **[or]** subcontract, ~~or basic ordering agreement~~ is expected to aggregate \$1 million or more or to increase the aggregate value of an existing contract to \$1[0] million or more, the contracting officer shall request **[clearance from]** the appropriate OFCCP regional office ~~to determine whether a contractor is awardable before--~~

(i) Award of any contract, including any indefinite delivery contract or letter contract; **[or]**

(ii) Modification of an existing contract for new effort that would constitute a contract award~~[.]~~ ~~or~~

~~(iii) The issuance of any basic ordering agreement.~~

(2) Preaward clearance for each proposed contract and for each proposed first-tier subcontract of \$1[0] million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed ~~in writing~~ **[by letter or facsimile transmission]**.

(3) When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward ~~review~~ **[clearance]** to the OFCCP regional office serving the area where the proposed contractor's corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor's corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward ~~review~~ **[clearance]** request action should be based on the location of the recruiting and training agency in the United States.

(4) **[The contracting officer does not need to request a preaward clearance if--**

(i) The specific proposed contractor is listed in OFCCP's National Preaward Registry via the Internet at <http://www.dol-esa.gov/preaward/>;

(ii) The projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and

(iii) The contracting officer documents the Registry review in the contract file.

(5) The contracting officer shall include the following information in the preaward ~~review~~ **[clearance]** request:

(i) Name, address, and telephone number of the prospective contractor and of any corporate affiliate at which work is to be performed.

(ii) Name, address, and telephone number of each proposed first-tier subcontractor with a proposed subcontract estimated at \$1**[0]** million or more.

(iii) Anticipated date of award.

(iv) Information as to whether the contractor and first-tier subcontractors have previously held any Government contracts or subcontracts.

(v) Place or places of ~~contract~~ performance **[of the prime contract]** and first-tier subcontracts estimated at \$1**[0]** million or more, if known.

(vi) The estimated dollar amount of the contract and each first-tier subcontract, if known.

(5**[6]**) The contracting officer shall allow as much time as feasible before award for the conduct of necessary ~~reviews~~ **[compliance evaluation]** by OFCCP. As soon as the apparently successful ~~contractor~~ **[offeror]** can be determined, the contracting officer shall process a preaward ~~review~~ **[clearance]** request in accordance with agency procedures, assuring, if possible, that the preaward ~~review~~ **[clearance]** request is submitted to the OFCCP regional office at least 30 ~~calendar~~ days before the proposed award date.

~~(6) In the event the Director has not made a final preaward clearance determination within 30 calendar days~~

~~from submission of the clearance request, the contracting officer shall withhold award of the contract for an additional 15 calendar days, or until clearance is received, whichever occurs first. If the additional 15 calendar days expire, and the Director has not either found the contractor to be in compliance or made a final written determination declaring the contractor ineligible for reasons of noncompliance, the award may be made to the contractor in question. The contracting officer shall notify the OFCCP regional office of the award.~~

**[(7) Within 15 days of the clearance request, OFCCP will inform the awarding agency of its intention to conduct a preaward compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward compliance evaluation, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.]**

**(7[8]) If the procedures specified in [paragraphs] (a)(5[6]) and (a)(6[7]) above [of this section] would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the offer or extension thereof, the contracting officer shall immediately inform the OFCCP regional office of the expiration date of the offer or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a preaward ~~review~~ [evaluation] cannot be completed by the required date, the contracting officer shall submit written justification for the award to the head of the contracting activity, who, after informing the OFCCP regional office, may then approve the award without the preaward clearance. If an award is made under this authority, the contracting officer shall immediately request a postaward ~~review~~ [evaluation] from the OFCCP regional office.**

**(8[9]) If, under the provisions of [paragraph] (a)(7[8]) above [of this section], a postaward ~~review~~ [evaluation] determines the contractor to be nonawardable [in noncompliance with E.O. 11246], the ~~Director~~ [Deputy**

**Assistant Secretary**] may authorize the use of the enforcement procedures at 22.809 against the noncomplying contractor.

(b) **Furnishing posters.** The contracting officer shall furnish to the contractor appropriate quantities of the poster entitled "Equal **[Employment]** Opportunity Is The Law." These shall be obtained in accordance with agency procedures.

#### **22.806 Inquiries.**

(a) An inquiry from a contractor regarding status of its compliance with E[.]O[.] 11246, or rights of appeal to any of the actions in 22.809[, ] shall be referred to the OFCCP regional office.

(b) Labor union inquiries regarding the revision of a collective bargaining agreement in order to comply with E[.]O[.] 11246 shall be referred to the ~~Director~~ **[Deputy Assistant Secretary]**.

#### **22.807 Exemptions.**

(a) Under the following exemptions, all or part of the requirements of E[.]O[.] 11246 may be excluded from a contract subject to E[.]O[.] 11246:

(1) *National security.* The agency head may determine that a contract is essential to the national security and that the award of the contract without complying with one or more of the requirements of this subpart is necessary to the national security. Upon making such a determination, the agency shall notify the ~~Director~~ **[Deputy Assistant Secretary]** in writing within 30 days.

(2) *Specific contracts.* The ~~Director~~ **[Deputy Assistant Secretary]** may exempt a[n] ~~contracting~~ agency from requiring the inclusion of one or more of the requirements of E[.]O[.] 11246 in any contract if the ~~Director~~ **[Deputy Assistant Secretary]** deems that special circumstances in the national interest so require. Groups or categories of contracts of the same type may also be exempted if the ~~Director~~ **[Deputy Assistant Secretary]** finds it impracticable to act upon each request individually or if group exemptions will contribute to convenience in the administration of E[.]O[.] 11246.

(b) The following exemptions apply even though a contract or subcontract contains the Equal Opportunity clause:

(1) *Transactions of \$10,000 or less.* The Equal Opportunity clause is required to be included in prime contracts and subcontracts by 22.802(a). Individual prime contracts or subcontracts of \$10,000 or less are exempt from application of the Equal Opportunity clause, unless the aggregate value of all prime contracts or subcontracts awarded to a contractor ~~or subcontractor~~ in any 12-month period exceeds, or can reasonably be expected to exceed, \$10,000. (Note: Government bills of lading, regardless of amount, are not exempt.)

(2) *Work outside the United States.* Contracts are exempt from the requirements of E[.]O[.] 11246 for work performed outside the United States by employees who were not recruited within the United States.

(3) *Contracts with State or local governments.* The requirements of E[.]O[.] 11246 in any contract with a State or local government (or any agency, instrumentality, or subdivision thereof) shall not be applicable to any agency, instrumentality[,], or subdivision of such government that does not participate in work on or under the contract.

(4) *Work on or near Indian reservations.* It shall not be a violation of E[.]O[.] 11246 for a contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. This applies to that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such preference shall not excuse a contractor from complying with E[.]O[.] 11246, rules and regulations of the Secretary of Labor, and applicable clauses in the contract.

(5) *Facilities not connected with contracts.* The ~~Director~~ **[Deputy Assistant Secretary]** may exempt from the requirements of E[.]O[.] 11246 any of a contractor's facilities that the ~~Director~~ **[Deputy Assistant Secretary]** finds to be in all respects separate and distinct from activities of the contractor related to performing the

contract; provided, that the ~~Director~~ **[Deputy Assistant Secretary]** also finds that the exemption will not interfere with, or impede the effectiveness of, E[.]O[.] 11246.

(6) *Indefinite[-]quantity contracts.* With respect to indefinite[-]quantity contracts and subcontracts, the Equal Opportunity clause applies unless the contracting officer has reason to believe that the amount to be ordered in any year under the contract will not exceed \$10,000. The applicability of the Equal Opportunity clause shall be determined by the contracting officer at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the Equal Opportunity clause shall be applied to the contract whenever the amount of a single order exceeds \$10,000. Once the Equal Opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration regardless of the amounts ordered, or reasonably expected to be ordered, in any year.

(c) To request an exemption under ~~subparagraphs (a)(1),~~ (a)(2), or (b)(5) **[of this section]**, the contracting officer shall submit, under agency procedure[s], a detailed justification for omitting all, or part of, the requirements of E[.]O[.] 11246. Requests for exemptions under ~~subparagraphs (a)(2) or (b)(5) above~~ **[of this section]** shall be submitted to the ~~Director~~ **[Deputy Assistant Secretary]** for approval.

(d) The ~~Director~~ **[Deputy Assistant Secretary]** may withdraw the exemption for a specific contract, or group of contracts, if the ~~Director~~ **[Deputy Assistant Secretary]** deems that such action is necessary and appropriate to achieve the purposes of E[.]O[.] 11246. Such withdrawal shall not apply--

(1) To contracts awarded before the withdrawal; or

(2) To any sealed bid contract (including restricted sealed bidding), unless the withdrawal is made more than 10 ~~calendar~~ days before the bid opening date.

## **22.808 Complaints.**

Complaints received by the contracting officer alleging violation of the requirements of E[.]O[.] 11246 shall be referred immediately to the OFCCP regional office. The

complainant shall be advised in writing of the referral. The contractor that is the subject of a complaint shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

#### **22.809 Enforcement.**

Upon the written direction of the ~~Director~~ **[Deputy Assistant Secretary]**, one or more of the following actions, as well as administrative sanctions and penalties, may be exercised against contractors found to be in violation of E[.]O[.] 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

- (a) Publication of the names of the contractor or ~~their~~ **[its]** unions.
- (b) Cancellation, termination, or suspension of the contractor's contracts or portion thereof.
- (c) Debarment from future Government contracts, or extensions or modifications of existing contracts, until the contractor has established and carried out personnel and employment policies in compliance with E[.]O[.] 11246 and the regulations of the Secretary of Labor.
- (d) Referral by the ~~Director~~ **[Deputy Assistant Secretary]** of any matter arising under E[.]O[.] 11246 to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.

#### **22.810 Solicitation provisions and contract clauses.**

(a) ~~The contracting officer shall insert the following provisions in solicitations w~~**[W]**~~hen a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity[, the contracting officer shall insert--]+~~

(1) ~~[The clause at] 52.222-21, Certification of Non~~**[Prohibition of S]**~~egregated Facilities, if the amount of the contract is expected to exceed \$10,000.[, in the solicitation and contract; and]~~

(2) **[The provision at] 52.222-22, Previous Contracts and Compliance Reports[, in the solicitation].**

(b) The contracting officer shall insert the provision at 52.222-23, Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity **[for Construction]**, in solicitations for construction when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of \$10,000.

(c) The contracting officer shall insert the provision at 52.222-24, Preaward On-Site Equal Opportunity Compliance Review **[Evaluation]**, in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be ~~for~~ \$1**[0]** million or more.

(d) The contracting officer shall insert the provision at 52.222-25, Affirmative Action Compliance, in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity.

(e) The contracting officer shall insert the clause at 52.222-26, Equal Opportunity, in solicitations and contracts (see 22.802) ~~unless all the terms of the clause are exempt~~ **[the contract is exempt from all of]** ~~from the requirements of E[.]O[.] 11246 (see 22.807(a)). If [the contract is exempt from] one or more, but not all, of the terms of the clause are exempt from the requirements of E[.]O[.] 11246,~~ the contracting officer shall use the ~~basic~~ clause with its Alternate I.

(f) The contracting officer shall insert the clause at 52.222-27, Affirmative Action Compliance Requirements for Construction, in solicitations and contracts for construction that will include the clause at 52.222-26, Equal Opportunity, **and [when]** the amount of the contract is expected to be in excess of \$10,000.

~~(g) The contracting officer shall insert the clause at 52.222-28, Equal Opportunity Preaward Clearance of Subcontracts, in solicitations and contracts, except for construction, when the amount of the contract is expected to be for \$1 million or more and includes the clause prescribed in paragraphs (a), (b), or (c) of 44.204.~~

~~(h) The contracting officer shall insert the clause at~~

52.222-29, Notification of Visa Denial, in contracts that will include the clause at 52.222-26, Equal Opportunity, if the contractor is required to perform in or on behalf of a foreign country.

\* \* \* \* \*

## **PART 52--SOLICITATION PROVISIONS AND SUBCONTRACT CLAUSES**

\* \* \* \* \*

### **SUBPART 52.2--TEXT OF PROVISIONS AND CLAUSES**

\* \* \* \* \*

#### **52.212-3 Offeror Representations and Certifications--Commercial Items.**

As prescribed in 12.301(b)(2), insert the following provision:

#### **OFFEROR REPRESENTATIONS AND CERTIFICATIONS--COMMERCIAL ITEMS (JAN 1999) [(Deviation)]**

\* \* \* \* \*

(d) *Certifications and representations required to implement provisions of Executive Order 11246--*

~~(1) Certification of non-segregated facilities. (Applies only if the contract amount is expected to exceed \$10,000)-- By submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees, any facilities that are segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise and that it does not and will not permit its employees to perform their services at any location where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in the contract.~~

~~(2) Previous contracts and compliance. The offeror represents that--~~

~~(i) It [] has, [] has not, participated in a previous contract or subcontract subject either to the Equal Opportunity clause of this solicitation, the clause originally contained in Section 310 of Executive Order~~

~~10925, or the clause contained in Section 201 of Executive Order 11114; and~~

(ii) It [] has, [] has not, filed all required compliance reports.

(3-[2]) *Affirmative Action Compliance.* The offeror represents that--

(i) It [] has developed and has on file, [] has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR ~~Subparts~~ 60-1 and 60-2), or

(ii) It [] has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

\* \* \* \* \*

**52.222-21 ~~Certification of Nons~~ [Prohibition of S]egregated Facilities.**

As prescribed in 22.810(a)(1), insert the following ~~provision [clause] in solicitations when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the contract amount is expected to exceed \$10,000:~~

~~CERTIFICATION OF NON~~ **[PROHIBITION OF] SEGREGATED FACILITIES**  
(APR 1984) **[(Deviation)]**

(a) "Segregated facilities," as used in this ~~provision~~ **[clause]**, means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees, that are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, **[sex,]** or national origin because of ~~habit, local custom, or otherwise~~ **[written or oral policies or employee custom]**. **[The term does not include separate or single-user rest rooms or necessary dressing or sleeping areas provided to assure privacy between the sexes.]**

(b) ~~By the submission of this offer, the offeror certifies~~  
**[The Contractor agrees]** that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. The ~~Offeror~~ **[Contractor]** agrees that a breach of this ~~certification~~ **[clause]** is a violation of the Equal Opportunity clause in the **[this]** contract.

(c) The **[Contractor shall include this clause in every subcontract and purchase order that is subject to the Equal Opportunity clause of this contract.]** ~~offeror further agrees that (except where it has obtained identical certifications from proposed subcontractors for specific time periods) it will—~~

~~(1) Obtain identical certifications from proposed subcontractors before the award of subcontracts under which the subcontractor will be subject to the Equal Opportunity clause;~~

~~(2) Retain the certifications in the files; and~~

~~(3) Forward the following notice to the proposed subcontractors (except if the proposed subcontractors have submitted identical certifications for specific time periods):~~

~~NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATIONS OF NONSEGREGATED FACILITIES.~~

~~A Certification of Nonsegregated Facilities must be submitted before the award of a subcontract under which the subcontractor will be subject to the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).~~

~~Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.~~

(End of ~~provision~~ **[clause]**)

**52.222-22 Previous Contracts and Compliance Reports.**

As prescribed in 22.810(a)(2), insert the following provision ~~in solicitations when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity:~~

PREVIOUS CONTRACTS AND COMPLIANCE REPORTS (APR 1984)  
[ (Deviation) ]

The offeror represents that--

(a) It [ ] has, [ ] has not participated in a previous contract or subcontract subject ~~either to the Equal Opportunity clause of this solicitation, the clause originally contained in Section 310 of Executive Order No. 10925, or the clause contained in Section 201 of Executive Order No. 11114;~~

(b) It [ ] has, [ ] has not filed all required compliance reports; and

(c) Representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained before subcontract awards.

(End of provision)

**52.222-23 Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity [for Construction].**

As prescribed in 22.810(b), insert the following provision ~~in solicitations for construction when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount is expected to be in excess of \$10,000:~~

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL  
EMPLOYMENT OPPORTUNITY [FOR CONSTRUCTION] (APR 1984)  
[ (Deviation) ]

(a) The offeror's attention is called to the Equal Opportunity clause and the Affirmative Action Compliance Requirements for Construction clause of this solicitation.

(b) The goals for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Goals for Minority  
Participation for  
Each Trade

Goals for Female  
Participation for  
Each Trade

*[Contracting Officer shall  
insert goals]*

*[Contracting Officer shall  
insert goals]*

These goals are applicable to all the Contractor's construction work performed in the covered area. If the Contractor performs construction work in a geographical area located outside of the covered area, the Contractor shall apply the goals established for the geographical area where the work is actually performed. Goals are published periodically in the Federal Register in notice form, and these notices may be obtained from any Office of Federal Contract Compliance Programs office.

(c) The Contractor's compliance with Executive Order 11246, as amended, and the regulations in 41 CFR 60-4 shall be based on (1) its implementation of the Equal Opportunity clause, (2) specific affirmative action obligations required by the clause entitled "Affirmative Action Compliance Requirements for Construction," and (3) its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade. The Contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor, or from project to project, for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, Executive Order 11246, as amended, and the regulations in 41 CFR 60-4. Compliance with the goals will be measured against the total work hours performed.

(d) The Contractor shall provide written notification to the ~~Director, Office of~~ **[Deputy Assistant Secretary for]** Federal Contract Compliance ~~Programs~~ **[, U.S. Department of Labor]**, within 10 working days following award of any construction subcontract in excess of \$10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the--

(1) Name, address, and telephone number of the subcontractor;

(2) Employer's identification number of the subcontractor;

- (3) Estimated dollar amount of the subcontract;
- (4) Estimated starting and completion dates of the subcontract; and
- (5) Geographical area in which the subcontract is to be performed.

(e) As used in this Notice, and in any contract resulting from this solicitation, the "covered area" is \_\_\_\_\_  
[Contracting Officer shall insert description of the geographical areas where the contract is to be performed, giving the state, county, and city].

(End of provision)

**52.222-24 Preaward On-Site Equal Opportunity Compliance Review [Evaluation].**

As prescribed in 22.810(c), insert the following provision in solicitations, ~~other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount is expected to be for \$1 million or more:~~

**PREAWARD ON-SITE EQUAL OPPORTUNITY COMPLIANCE REVIEW  
[EVALUATION] (APR 1984) [(Deviation)]**

~~An award in the amount of \$1 million or more will not be made under this solicitation unless the offeror and each of its known first-tier subcontractors (to whom it intends to award a subcontract of \$1 million or more) are found, on the basis of a compliance review, to be able to comply with the provisions of the Equal Opportunity clause of this solicitation.~~ [If a contract in the amount of \$10 million or more will result from this solicitation, the prospective Contractor and its known first-tier subcontractors with anticipated subcontracts of \$10 million or more shall be subject to a preaward compliance evaluation by the Office of Federal Contract Compliance Programs (OFCCP), unless, within the preceding 24 months, OFCCP has conducted an evaluation and found the prospective Contractor and subcontractors to be in compliance with Executive Order 11246.]

(End of provision)

#### 52.222-25 Affirmative Action Compliance.

As prescribed in 22.810(d), insert the following provision ~~in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity:~~

##### AFFIRMATIVE ACTION COMPLIANCE (APR 1984)

The offeror represents that--

(a) It [] has developed and has on file, [] has not developed and does not have on file, at each establishment, affirmative action programs required by the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2); or

(b) It [] has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(End of provision)

#### 52.222-26 Equal Opportunity.

As prescribed in 22.810(e), insert the following clause ~~in solicitations and contracts (see 22.802) unless all of the terms of the clause are exempt from the requirements of EO 11246 (see 22.807(a)):~~

##### EQUAL OPPORTUNITY (APR 1984) [(Deviation)]

(a) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Contractor shall comply with subparagraphs

(b)(1) through (11) ~~below~~ **[of this clause]**. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

(b) During ~~performing~~ **[performance of]** this contract, the Contractor agrees as follows:

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. **[However, it shall not be a violation of this clause for the Contractor to extend a**

**publicly announced preference in employment to Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation, as permitted by 41 CFR 60-1.5.]**

(2) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to--

- (i) Employment;
- (ii) Upgrading;
- (iii) Demotion;
- (iv) Transfer;
- (v) Recruitment or recruitment advertising;
- (vi) Layoff or termination;
- (vii) Rates of pay or other forms of compensation; and
- (viii) Selection for training, including apprenticeship.

(3) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this clause.

(4) The Contractor shall, in all solicitations or advertisement[s] for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(5) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

(6) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.

(7) The Contractor shall furnish to the contracting agency all information required by Executive Order 11246, as amended, and by the rules, regulations, and orders of the

Secretary of Labor. [The Contractor shall also file Standard Form 100 (EEO-1), or any successor form, as prescribed in 41 CFR part 60-1. Unless the Contractor has filed within the 12 months preceding the date of contract award, the Contractor shall, within 30 days after contract award, apply to either the regional OFCCP office or the local office of the Equal Employment Opportunity Commission for the necessary forms] ~~Standard Form 100 (EEO-1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceding the date of award.~~

(8) The Contractor shall permit access to its [premises, during normal business hours, by the contracting agency or the Office of Federal Contract Compliance Programs (OFCCP) for the purpose of conducting on-site compliance evaluations and complaint investigations. The Contractor shall permit the Government to inspect and copy any] books, [accounts,] records, ~~and accounts by the contracting agency or the Office of Federal Contract Compliance Programs for the purposes of [(including computerized records), and other material that may be relevant to the matter under]~~ investigation [and pertinent] to ~~ascertain the Contractor's compliance with the applicable [Executive Order 11246, as amended, and] rules, [and] regulations, and orders [that implement the Executive Order].~~

(9) If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, ~~in the~~ rules, regulations, and orders of the Secretary of Labor ~~;~~ or as otherwise provided by law.

(10) The Contractor shall include the terms and conditions of subparagraph[s] (b)(1) through (11) of this clause in every subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor.

(11) The Contractor shall take such action with respect to any subcontract or purchase order as the contracting ~~agency~~ **[officer]** may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

(c) Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1.

(End of clause)

Alternate I (Apr 1984). ~~If one or more, but not all, of the terms of the clause are exempt from the requirements of E.O. 11246 (see 22.807(a)), the contracting officer shall~~ **[As prescribed in 22.810(e),]** add the following as a preamble to the clause:

Notice: The following terms of this clause are waived for this contract: \_\_\_\_\_ *[Contracting Officer shall list terms]*.

**52.222-27 Affirmative Action Compliance Requirements for Construction.**

As prescribed in 22.810(f), insert the following clause ~~in solicitations and contracts for construction that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of \$10,000:~~

**AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION**  
(APR 1984) **[(Deviation)]**

(a) *Definitions.* "Covered area," as used in this clause, means the geographical area described in the solicitation for this contract.

~~"Director~~ **[Deputy Assistant Secretary],** as used in this clause, means the ~~Director, Office of~~ **[Deputy Assistant Secretary for]** Federal Contract Compliance Programs ~~(OFCCP), United States [U.S.] Department of Labor or any person to whom the Director delegates authority[, or a designee].~~

\* \* \* \* \*

(g) \* \* \*

(4) Immediately notify the ~~Director~~ **[Deputy Assistant Secretary]** when the union or unions with which the Contractor has a collective bargaining agreement has not referred back to the Contractor a minority or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

(5) Develop on-the-job training opportunities and/or participate in training programs for the area that expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under subparagraph (g) (2) ~~above~~ **[of this clause]**.

(6) \* \* \*

(7) Review, at least annually, the Contractor's equal employment policy and affirmative action obligations with all employees having responsibility for hiring, assignment, layoff, termination, or other employment decisions. Conduct review of this policy with all on[-]site supervisory personnel before initiating construction work at a job site.

A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

\* \* \* \* \*

(14) Ensure that all facilities and company activities are nonsegregated except that separate or single-user ~~toilets~~ **[rest rooms]** and necessary ~~changing facilities~~ **[dressing or sleeping areas]** shall be provided to assure privacy between the sexes.

(15) Maintain a record of solicitations for subcontracts for minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

(16) Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's equal employment policy and affirmative action obligations.

(h) The Contractor is encouraged to participate in voluntary associations that may assist in fulfilling one or more of the affirmative action obligations contained in subparagraphs (g)(1) through (16) **[of this clause]**. The efforts of a contractor association, joint contractor-union, contractor-community, or similar group of which the contractor is a member and participant may be asserted as fulfilling one or more of its obligations under subparagraphs (g)(1) through (16) **[of this clause]**, provided the Contractor--

\* \* \* \* \*

(m) The Contractor in fulfilling its obligations under this clause shall implement affirmative action procedures at least as extensive as those prescribed in paragraph (g) ~~above~~ **[of this clause]**, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of Executive Order 11246, as amended, the implementing regulations, or this clause, the ~~Director~~ **[Deputy Assistant Secretary]** shall take action as prescribed in 41 CFR 60-4.8.

(n) \* \* \*

(o) \* \* \*

(End of clause)

**52.222-28 ~~Equal Opportunity Preaward Clearance of Subcontracts.~~ [Reserved]**

~~As prescribed in 22.810(g), insert the following clause:~~

~~Equal Opportunity Preaward Clearance of Subcontracts  
(Apr 1984)~~

~~Notwithstanding the clause of this contract entitled "Subcontracts," the Contractor shall not enter into a first-tier subcontract for an estimated or actual amount of \$1 million or more without obtaining in writing from the Contracting Officer a clearance that the proposed subcontractor is in compliance with equal opportunity requirements and therefore is eligible for award.~~

~~(End of clause)~~

**52.222-29 Notification of Visa Denial.**

As prescribed in 22.810(~~4~~ **[g]**), insert the following clause ~~in contracts that will include the clause at 52.222-26, Equal Opportunity, if the Contractor is required to perform in or on behalf of a foreign country:~~

NOTIFICATION OF VISA DENIAL (APR 1984) **[(Deviation)]**

It is a violation of Executive Order 11246, as amended, for a Contractor to refuse to employ any applicant or not to assign any person hired in the United States, on the basis that the individual's race, color, religion, sex, or national origin is not compatible with the policies of the country where the work is to be performed or for whom the work will be performed (41 CFR 60-1.10). The Contractor agrees to notify the **[U.S.] Department of State, [Assistant Secretary, Bureau of Political-Military Affairs (PM), 2201 C Street NW, Room 7325,] Washington, DC [20520], Attention: Director, Bureau of Political-Military Affairs, and the ~~Director, Office of~~ **[U.S. Department of Labor, Deputy Assistant Secretary for]** Federal Contract Compliance Programs, when it has knowledge of any employee or potential employee being denied an entry visa to a country in which the Contractor is required to perform this contract, and it believes the denial is attributable to the race, color, religion, sex, or national origin of the employee or potential employee.**

(End of clause)

\* \* \* \* \*